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No. 71-175

In the Supreme Court of the United States

OCTOBER TERM, 1971

ANTHONY FERNANDEZ, PETITIONER

v.

JACOB J. PARKER, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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In 1963, in the United States District Court for the Western District of Washington, petitioner was convicted of the interstate transportation of property obtained by fraud and was sentenced to imprisonment for eleven years and eleven months. His conviction was affirmed. 329 F. 2d 899 (C.A. 9), certiorari denied, 379 U.S. 832. Petitioner thereafter attacked the judgment in a number of proceedings (see No. 1283 Misc., O.T., 1968). In one such proceeding,

he alleged that his conviction was invalid because he was a Spanish-American and persons of Spanish-American background had been systematically excluded from the grand and petit juries which indicted and tried him. The court of appeals ordered a hearing on whether petitioner had waived that issue (as to the petit jury only) and, if not, on the merits of that claim. 408 F. 2d 974 (C.A. 9).

The district court conducted a hearing at which the clerk (who was one half of the jury commission) and deputy clerk of the court, the bailiff and the son of the jury commissioner at the time in question [1] testified. At the conclusion of the hearing, the judge found that the matter of the composition of petit juries had not been considered at the time of trial and that petitioner had not knowingly waived his right to challenge their composition. The court found that "the jury panels drawn for the terms of court here involved were selected at random from the voting registers of the ten counties comprising the Southern Division of the Western District of Washington in proportion to population, without discrimination" (App., *infra*, 9). The court of appeals affirmed, noting that petitioner had not supplied the transcript of the hearing on the motion and thus "is precluded from contending that the findings of fact made by the district judge are not supported by substantial evidence" (App., *infra*, 9). There is similarly no basis for review by this Court of the factual findings of the

[1] The jury commissioner was incapacitated at the time of the hearing.

district court,[2] which, in any event, there appears to be no reason for questioning.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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[2] The testimony of the son of the jury commissioner, which petitioner attaches to his application, supports the finding that there was no discrimination on account of nationality. This testimony does not, as petitioner suggests, show that the jury commissioner improperly delegated his authority; the son testified that the jury commissioner supervised all decisions. Moreover, as the court of appeals observed, the testimony relates to a period ending in 1955, long before the time at issue here, and is therefore "irrelevant and immaterial" (App., *infra*, 8).